

Fair Justice Task Force

Subcommittee on Mental Health and the Criminal Justice System

Tuesday, October 24, 2017
Conference Room 345, Arizona State Courts Building
1501 West Washington Street
Phoenix, AZ 85007

Present: Kent Batty, Chair, Mary Lou Brncik Jim Dunn, Vicki Hill, Josephine Jones, Kathleen Mayer, Judge Joe Mikitish, Dr. Carol Olson, Nancy Rodriguez, Dr. Michael Schafer, Judge Susan Shetter, Commissioner Barbara Spencer, Lisa Surhio, Paul Thomas, Juli Warzynski,

Telephonic: Dr. Tommy Begay

Absent/Excused: Susan Alameda, Detective Kelsey Commisso, Ms. India Davis, Dr. Dawn Noggle, Mary Ellen Sheppard, Detective Sabrina Taylor, Danna Whiting

Administrative Office of the Courts (AOC) Staff: Jennifer Albright, Theresa Barrett, Mike Baumstark, Dave Byers, Jennifer Greene, Don Jacobson, Jodi Jerich, Amy Love, Sabrina Nash, Kathy Sekardi

I. Welcome, Opening Remarks, and Approval of Minutes

The October 24, 2017 meeting of the Fair Justice Subcommittee on Mental Health and the Criminal Justice System was called to order at 10:05 a.m. by Kent Batty, chairman. The chairman thanked the members for their attendance and asked each one to introduce themselves.

The draft minutes of the September 12, 2017 meeting were presented for approval. The members proposed a correction to a typographical error and also proposed to amend the minutes to note that at the September 12, 2017 meeting, the Subcommittee discussed whether it should consider changes to Arizona statutes to consider a person's mental disorder at the time the crime was committed. With consensus on the correction and amendment and no other proposed changes to the minutes, the chair declared their approval as amended.

Mr. Batty shared with the members that he, and others present including Ms. Jerich and Mr. Jacobson, attended the Court Leadership Conference held in Flagstaff earlier this month. He noted that the conference devoted a significant amount of time to what the justice system can do to address mental health issues in our society. He noted that the author of a soon-to-be-released Conference of State Court Administrators (COSCA) white paper, Milton Mack (a former probate judge, now Michigan State Court Administrator), spoke to the conferees that there is a public safety crisis because the justice system fails to timely identify and address mental health treatment needs of persons who come into the court system. The result is that, without

meaningful treatment, many mentally ill persons will cycle through the criminal justice system over and over again, turning more jails and prisons into the primary mental health treatment facilities for these individuals. Mr. Mack advocated for states to consider changing the standard for civil court-ordered mental health treatment to a “lack of capacity” standard that is similar to the standard for the appointment of a guardian. Other speakers, including Miami-Dade County Florida Judge Steven Leifman, National Center for State Courts Consultant Patti Tobias, and Flagstaff Police Sergeant Cory Runge provided valuable insight on the problems the mentally ill and their families face when meaningful community-based behavioral health treatment is not provided to individuals who need treatment.

II. Legislative Update

Amy Love, Deputy Director for Government Affairs for the Administrative Office of the Courts (AOC), provided the Subcommittee a review of legislation that was developed by the Fair Justice Task Force. Ms. Love noted that last year, the legislature passed SB1157 to give limited jurisdiction courts jurisdiction over criminal competency proceedings. However, other Fair Justice Task Force legislation was not enacted. Amy then provided an overview of those bills and stated the Supreme Court will again advocate for their passage at the upcoming legislative session.

III. Report from the Rule 11 Workgroup

Draft Administrative Order

Don Jacobson, AOC Senior Special Projects Consultant and chair of the Rule 11 Workgroup provided a report on the Workgroup’s October 16, 2017 meeting. The Workgroup developed a draft Administrative Order (AO) that is to be considered as a template for presiding judges to use if they authorize limited jurisdiction courts (LJs) in their counties to conduct Rule 11 criminal competency proceedings. The AO provides direction to LJs on what they should do to ensure the proceedings comply with court rule and state law. Additionally, the Workgroup developed a policies and procedures document that is designed to accompany the AO. This document also provides policies and procedures the courts need to consider when establishing a Rule 11 court.

The members discussed the need for Rule 11 courts to be able to access records from the other jurisdictions that conduct Rule 11 or Title 36 court-ordered mental health treatment proceedings. At present, there is no ability for courts to electronically access these records. As more LJs begin to conduct Rule 11 proceedings, the need for a centralized repository for records will become more acute. Members were informed that Maricopa County Superior Court is in the process of developing a file-sharing system to address this issue. In addition to accessing records from other courts, the members also discussed that courts should strive for consistency in how each conducts Rule 11 proceedings. For example, if courts issued similarly-formatted minute entries, then it would be easier for prosecutors, defense counsel, and judges to review case documents.

The committee members provided changes to the language of the AO and the policies and procedures document. Revised documents will be brought back to the Subcommittee for formal action at November's meeting.

Value of Holding Rule 11 proceedings at the local level

Members discussed how the Mesa and Glendale Rule 11 pilot programs illustrated the value of having LJC's conduct Rule 11 competency proceedings. It was suggested that holding Rule 11 matters locally yields several benefits for the defendant and for the municipality. Both Mesa and Glendale reported speedier resolutions of Rule 11 motions for the defendant and reduced costs for the municipality. The members noted that for many misdemeanor offenders, it may be less burdensome for them to appear at the local courthouse than to travel to the county's superior court. Information presented by the Mesa and Glendale pilot programs showed that failure to appear rates were dramatically lowered, in large part due to conducting medical evaluations at the local courthouse or near the courthouse. Discussion also pointed out that these benefits may be further amplified if a municipality conducts Rule 11 hearings and has a mental health court. If a defendant is found competent but has general mental health issues, a mental health court may be helpful in combining mental health care treatment with the adjudication of the underlying criminal offense.

The Subcommittee discussed the need for judges who conduct Rule 11 proceedings to have adequate training.

Clarification of Rule 11.5 of the Arizona Rules of Criminal Procedure

Members reviewed the changes to Rule 11 that were approved by Supreme Court Order No. R-7-002 and that go into effect January 1, 2018. Regarding Rule 11.5 "Hearing and Orders," members expressed concern that this provision may be unclear. Members discussed how Rule 11.5(b)(3) could be read to give an LJC jurisdiction to begin civil commitment proceedings under ARS §§ 36-501 et seq. or to order the appointment of a guardian under ARS §§ 14-5301 et seq. Members opined that it was probably the intent that only the superior court have the ability to initiate Title 36 civil commitment proceedings or to appoint a guardian. Therefore, the members suggested that Rule 11.5 be clarified.

In addition to clarifying changes, the members expressed a desire to consider an additional substantive changes to Rule 11.5. This change would permit an LJC to retain jurisdiction over a defendant who has been found competent but restorable so that the LJC may order competency restoration treatment. Members noted that municipalities have always been responsible to pay the costs for Rule 11 proceedings, even when LJC's transferred misdemeanor cases to the superior court. Therefore, since the local jurisdictions have been responsible for the costs for mental competency evaluations and any subsequent restoration to competency treatment, the members expressed support for the local court to be able to retain jurisdiction over restoration proceedings.

IV. Review of the Sequential Intercept Model

Ms. Shelly Curran, Director of Crisis, Cultural, Prevention and Court Programs with Mercy Maricopa, talked to the Subcommittee on the elements of the Sequential Intercept Model (SIM). Ms. Curran reviewed two of the five interception points where mental health and criminal justice intersect.

Ms. Curran discussed the implementation of SIM in Maricopa County. SIM was developed by the Substance Abuse and Mental Health Services Administration's (SAMHSA) GAINS Center for Behavioral Health and Justice Transformation. Through use of the SIM, if at each of the intercepts there is an appropriate intervention that can take place, then a person will not have to penetrate further into the criminal justice system. Moreover, if there are specific interventions to meet the needs of a person with mental health issues who is going through the criminal justice system, then there is an opportunity to reduce the recidivism of that person as well.

Ms. Curran urged the Subcommittee to take the opportunity to identify all those areas where the courts may make a difference on a person's path through the criminal justice system.

Intercept 1: Law Enforcement. Intercept 1 is the first opportunity for the criminal justice system to encounter a person with mental illness. This usually occurs when a call comes into police dispatch or when law enforcement on patrol notices someone acting erratically.

Ms. Curran stressed the need for 9-1-1 operators and law enforcement to be trained to screen for mental health issues. Many law enforcement officers go through Crises Intervention Training (CIT). In fact, the Arizona Peace Officer Standards Training (AZ POST) requires new officers to take at least four (4) hours of CIT training in order to have a basic understanding of how to identify a mental health issue when they go out to a scene. Ms. Curran noted that with adequate training, a CIT-trained 9-1-1 operator could dispatch a CIT police officer to go out on calls where there is an identified mental health crisis.

Ms. Curran noted that with proper training and resources, police can divert persons for appropriate treatment instead of taking a person to jail. She noted that last year in Maricopa County, police conducted 16,000 drop offs to urgent psychiatric centers. Only about 6,000 these drop offs were for a court ordered evaluation. The remaining 10,000 drop offs were when police officers, on their own initiative, identified the person had a mental health issue. The officer then filed an application for emergency admission or the person agreed to voluntarily go with the officer to the urgent psychiatric care facility. Ms. Curran noted that this underscored the fact that even if all police are highly trained in CIT, the training is of little use if the community lacks sufficient resources to provide treatment. Without adequate resources, police have no other option but to take a person to jail.

Ms. Curran noted that Maricopa County is fortunate to have Crises Mobile Teams (CMTs). These CMTs go out to crime scenes and are called out about 300 times per month. CMTs allow the officer to leave the scene and have the CMT take over to stabilize the person or take them to the urgent psychiatric care facility.

Ms. Curran emphasized that interception at Intercept 1 is a pre-booking diversion opportunity to get persons with mental health treatment instead of just being placed in jail. It, however, does not mean the person will not be charged, but it does give an option other than jail. Ms. Curran stressed that it is counterproductive for a person to be sent to jail simply because the officer or the judge may believe that a jail is a place where the person will get treatment and be safe.

Intercept 2: Initial Appearance/Booking. The second intercept is when a person is brought into the criminal justice system. This is typically when a person is booked into jail or the person has an initial appearance hearing. In Maricopa county jail, there were over 100,000 bookings into jail last year and on average 7% of the persons booked are SMI.

Ms. Curran reported to the Subcommittee that in Maricopa County and in other counties, there is a direct, bi-directional data link between the jail and the regional behavioral health authority (RBHA). Through this data link, the RBHA shares with the jail any medical and treatment information it has for the person who is being booked into the jail. Ms. Curran noted that providing the jail this information is critical to make sure people receive appropriate treatment while in jail. This helps to prevent further mental health deterioration during incarceration.

Ms. Curran noted that Subcommittee member, Dr. Schafer helped develop the data sharing link in Maricopa and Pima Counties.

At Intercept 2, the courts also get involved in the identification of persons with mental health needs. RBHAs share information with the courts if a person has a serious mental illness. At initial appearance, adult probation will have this information when a pretrial risk assessment is conducted. Ms. Curran mentioned after initial appearance but before the preliminary hearing, the Maricopa RHBA provides the court, defense counsel, and the prosecutor a report that details any defendant's mental health information it has to share. The report details what benefits a defendant has and how treatment may be connected with that defendant.

Ms. Curran stressed that it is important for judges in Maricopa County who conduct initial appearance hearings to be aware that the judge has an alternative other than jail to get treatment to a defendant who has mental health care needs. Criminal Justice Engagement teams (CJETs) are transport services from Southwest Behavioral Health. CJETs will pick up any person a judge will release in to their care. With the defendant's consent, the CJET will provide up to three months of treatment. Ms. Curran mentioned that Judge Finn, Presiding Judge of the Glendale City Court, has begun utilizing CJET services.

Ms. Curran discussed the concept of "mercy bonds." She said a "mercy bond" is a bond ordered by a court even if the pretrial risk assessment tool shows that defendant has a low risk of flight or is not considered to be dangerous. She said that while a judge may be well intentioned, "mercy bonds" are issued based on the incorrect assumption that the person will receive treatment in jail and will be safe. Ms. Curran said that through CMTs and CJETs, there are treatment options available that are a viable alternative to pre-adjudication jail.

Lastly, Ms. Curran also discussed release planning. The RHBA will develop a "release plan" for

defendants who have been in custody for over 30 days and who have an identified release date.

The chairman thanked Ms. Curran for her presentation.

V. Recommendations relating to the Subcommittee's charges.

Dave Byers, Administrative Director of the AOC, addressed the Subcommittee. He thanked the members for their willingness to serve on the Subcommittee and to address the very important issues surrounding the mental health and the criminal justice system. Mr. Byers noted that at the recent Court Leadership Conference, speakers raised the question whether the state's standard for ordering mental health treatment should be changed. He said that several speakers mentioned that the court system should not have to wait for a criminal justice crisis before a judge can order treatment. He relayed that that often people with mental health care needs may find themselves in both the criminal and civil justice system.

Mr. Byers informed the Subcommittee that the Conference of State Court Administrators (COSCA) is preparing to issue a white paper that will include a call for a change in the standard for ordering civil treatment. Based on an interest in the legislature to tackle mental health issues in the upcoming legislative session, the Subcommittee's work is very timely to consider if the standard should change. He said he will be interested in learning of the Subcommittee's discussion about the possibility of change the standard for Title 36 court-ordered treatment in Arizona.

The chairman informed the Subcommittee that the Fair Justice Task Force will meet on November 27, 2017. The Subcommittee will provide a status report at that meeting. This report will inform the Task Force on the Subcommittee's work, to date, on its four (4) charges.

Charge #1: Identify rules and procedures to implement SB1157

Mr. Batty noted that the Administrative Order and the corresponding policies and procedures, as developed by the Rule 11 Workgroup, had already been covered earlier in the meeting.

The Subcommittee next discussed the evolution of Rule 11. After the passage of SB1157 which amended ARS § 13-4503 to give LJs jurisdiction over competency proceedings, the Supreme Court amended Rule 11 of the Arizona Rules of Criminal Procedure to reflect the statutory changes. That change went into effect on August 9, 2017 on an emergency basis. Subsequently, the Criminal Rules Task Force restyled the entire criminal rules and incorporated the substantive changes to Rule 11. Those Rules are effective January 1, 2018. The Subcommittee noted that the emergency Rule 11.5 explicitly stated only the superior court had the authority to order Title 36 treatment or to appoint a guardian for persons found incompetent but not restorable. However, the Subcommittee members found that the language of the final Rule was not as clear as that of the emergency Rule. The members found merit in proposing the Rule be rewritten to clearly state that LJs may not order Title 36 treatment or appoint a guardian for persons found incompetent and not restorable

Additionally, the members discussed whether the LJs, as a matter of public policy, should be able to order restoration treatment for persons found to be incompetent but restorable. The members indicated a desire to redraft the Rule to propose a substantive change to allow LJs to retain jurisdiction and order restoration. The Subcommittee members noted that nothing in the language of SB1157 required competency proceedings be transferred to the superior court. Members further opined that LJs should be allowed to order restoration because the defendant may benefit from a continuity of care if restoration treatment options are available locally. They noted that the policy reasons that supported LJs conducting Rule 11 proceedings arguably support LJs to have jurisdiction over restoration treatment. Members said that since Glendale and Mesa judges were acting as superior court judges pro tempore during the Rule 11 pilot program, these municipal court judges had authority to decide whether to dismiss the charges or to order competency restoration treatment. Furthermore, as noted earlier, since the municipality pays for the restoration, then there is an argument that the LJ should have the option to make the decision whether to incur those costs. The Subcommittee discussed redrafting Rule 11.5 to make clarifying changes, but to also provide the presiding judge of a county the flexibility to allow the LJ to order restoration if the presiding judge so chooses.

The Subcommittee directed Jennifer Greene, AOC staff attorney, to draft a proposed revision to Rule 11.5 and bring it back to the Subcommittee at the November meeting.

Next, Mr. Batty asked the Subcommittee to consider the benefits of having Rule 11 medical evaluations conducted in the Rule 11 courthouse and whether the Subcommittee should recommend this be considered as a best practice. Members noted that defendants are challenged to travel to doctors that may be far from their residences. Members asserted that a defendant is far more likely to show up for an evaluation if it's convenient for them to do so. A missed evaluation is a cost to the municipality or county and could potentially end up in increased costs for incarceration. Members noted that it makes sense to provide the courthouse or a location that is easily accessible by public transit as the centralized location for medical evaluations. Members noted that by making the courthouse available for Rule 11 evaluations, it is an opportunity for the courts to bring services to the people instead of making the people find a way to get to the services. By scheduling medical evaluations at the courthouse, the justice system has the opportunity to make the services easier to access.

Charge #2: Determine if the standard for ordering court ordered treatment should be altered to allow for earlier intervention.

The chair asked the members for their input whether the statutory standards for Title 36 court ordered mental health treatment should be amended. He informed the members they had two separate handouts in front of them. The first handout is an excerpt from ARS § 36-501 that provides the current statutory definitions for "danger to self," "danger to others," "persistent and acute disability," "grave disability" and "mental disorder." A second handout is a legislative proposal that changes the standard for a court to order treatment in ARS § 36-540. It eliminates the definition of "grave disability" and "persistent and acute disability" and replaces these terms with a new defined term called "lacks capacity to make an informed decision." The proposal also makes changes to a guardianship statute. In summary, this proposal changes the standard for court ordered treatment to mirror closely the standard for a court to appoint a guardian.

Mr. Batty shared that speakers at the Court Leadership Conference pointed out that Arizona's standard requires a court to look at a person's future conduct – that there is a “substantial probability of causing a person to suffer.” Additionally, the chairman noted that at the conference, the proposal was made that mental and physical illnesses should be treated similarly.

Members reviewed the materials and commented. Members concurred that the persistent and acute disability standard is already a broad standard. Some noted that the current “persistent and acute disability” standard is essentially a lack of capacity to give informed consent standard after being told the advantages and disadvantages of treatment and of the alternatives to treatment that are available. Some members expressed concern about this proposal to change the standard for court-ordered treatment. Members stated there is controversy in the medical community over certain mental health diagnoses. Members noted that the civil commitment statutes require a person undergo treatment that they don't want or to be placed in a facility where they don't want to be.

The Subcommittee discussed that there are issues beyond the treatment standard that prevent assistance from getting to those who truly need it. Additionally, some members disputed the idea that the court should consider mental illness the same as physical illness. It was noted that a court cannot order a person to undergo unwanted medical treatment even if it's in the person's best interest. Other members noted that the decades long class action lawsuit (Arnold v. Sarn) has resulted in a good assisted outpatient treatment standard.

Members noted a lack of long term inpatient resources as a more pressing issue that the mental health care community faces. Members discussed the need for persons to spend more time in inpatient treatment before moving to outpatient treatment. Members also shared that the maximum census for Maricopa of 55 beds at the Arizona State Hospital has not changed since the 1980s. Finally, members expressed concern with the quality of outpatient treatment options available to persons after they are released from inpatient care.

Some members expressed a desire for the Subcommittee to take up at a future meeting the applicability of the definition of “mental disorder” in Title 36. Currently, a person who is psychotic due to a traumatic brain injury is not considered SMI and will not be eligible to receive court ordered treatment. At a future meeting, the members will address the definition of mental disorder and whether it should be amended to include people with brain injuries who also have behavioral symptoms.

The chairman found there was no consensus among the member to change the standard as proposed.

The Subcommittee ran out of time to discuss recommendations for Charges #3 and #4.

The meeting adjourned at approximately 2:10 p.m.